Virginia Law Register

VOL. 1, N. S.] DECEMBER, 1915. [No. 8

THE AMERICAN JUDICIARY.*

All thoughtful men agree that it would be impossible to govern any country wisely without a good judiciary; and accordingly every enlightened nation has established courts, conferring on them such powers and imposing on them such duties as seem best calculated to promote the public welfare. Indeed, the importance of the judiciary is now so thoroughly recognized that in every land where liberty is cherished and the law respected, the people are engaged in a constant struggle to improve their system; and in that struggle the lawyers have everywhere borne the most conspicuous, as well as the most useful part. With that thought in my mind, it has seemed to me that I could not better employ the hour which it is my privilege to spend as a guest of the American Bar Association than in discussing "The American Judiciary." The subject falls naturally into three principal divisions: the selection and the tenure of the judges; the method of administering justice; and certain exceptional features.

THE SELECTION AND TENURE OF JUDGES.

Since the American judiciary includes our state courts as well as our United States courts, and as practically all the state judges are elected for a term of years, while all of the United States judges are appointed for life, neither the manner of selecting our judges nor their official tenure can be deemed a characteristic of our system. Many intelligent men insist that since our state and federal judiciaries differ so widely in that respect, one or the other must be wrong; but that does not necessarily follow. It is entirely possible that the same end may be reached in two different ways without either way being

*Address delivered by Hon. Joseph W. Bailey of Texas before the American Bar Association at the annual meeting in Salt Lake City, October, 1915.

wrong. They may both be good; and the difference may only signify that the one is better than the other.

It is perhaps a waste of time for me to consider whether the state or the federal practice is the wiser, because nothing which I could say will produce any change in either. The policy of the general government, and the policy of the states, in that regard, are both fixed; and, in my judgment, are fixed irrevocably. Nothing less than a political convulsion will ever move the United States to elect its judges for a term of years; nor is it probable that any change of sentiment will ever induce these states to appoint their judges for life. The question, however, must always be an interesting one, and it is worthy our consideration.

I am not one of those who believe that the best judges are always secured by appointments for life. I know the advantages of such appointments, and I also know the disadvantages of them. I understand the argument that a President or a Governor is more apt to appoint, than the people are to elect, good judges; but the practical results have not demonstrated the soundness of that argument. We have not, of course, been able to compare a federal judiciary elected with a federal judiciary appointed; but we have passed from the federal courts which are presided over by judges appointed for life, into the state courts which are presided over by judges elected for a term of years, and a majority of the lawyers with whom I have the honor of a personal acquaintance prefer the state courts.

That preference is not based on any fear that justice cannot be obtained in the federal courts; and it is due largely, if not entirely, to the demeanor of the federal judges. They are more arbitrary with the lawyers, less patient with the witnesses, and less considerate of the parties. I expect all federal judges to resent that criticism, but I assure them that it is a friendly one, frankly spoken in the hope that it will help them to see themselves as others see them, and thus aid them in relieving themselves from a censure which they must know is very general, although they may not think it just.

I do not believe that the difference between the demeanor of state and federal judges is attributable to any difference in their

dispositions, and I attribute it to the difference in their tenure of office; for there are few men in this world so perfectly constituted that they will exercise a power which cannot be taken from them with the same moderation as they would exercise a power which can be taken from them. That same sense of security which is relied on to make federal judges independent of public clamor may also make them indifferent to private right; and it is absolutely certain that any judge who would be an arrant coward without that sense of security will be a petty tyrant with it.

I do not doubt that a judge appointed for life will fear the people less than a judge elected for a term of years; and neither do I doubt that a judge appointed for life will respect the people less than a judge elected for a term of years. We can escape one evil through appointing our judges for life, but we can only do so by encountering another and a greater evil—greater because there is, and always will be until human nature undergoes a radical change, more danger that permanent power will be exercised oppressively than that temporary power will be exercised with too much indulgence. The vacillating judge excites contempt; the arbitrary judge excites resentment; and as long as the world stands, men who could hope to be judges under any system, will dread contempt more than they will resentment. For that reason, the judge elected for a term of years is less apt to be a coward than the judge appointed for life is to be a tyrant.

Conceding all that I have just said, and admitting that I have not exaggerated the evil of it, many men who have won high places at the Bar contend that, notwithstanding, we can best assure a good judiciary by appointing our judges for life; and in support of that contention they point out what they are pleased to call the superiority of our federal courts over our state courts. That federal judges are superior to state judges, taken as a whole, will not be questioned; but that superiority is, in my judgment, due to circumstances wholly apart from the manner of their selection or the tenure of their office.

In selecting a federal district judge, the President can, as a rule, choose from among a million men, while the trial judges in our states must be selected from a very small fraction of that

number; and the larger number from which any choice can be made must always afford the opportunity for making a better choice. Another circumstance to which federal courts owe much of their superiority over state courts, is that a federal judgeship is considered a higher honor than a state judgeship of similar rank. It may mortify our state pride to admit that, but it is true, nevertheless, and lawyers who will readily accept a federal judgeship will as readily decline a state judgeship. Then too, a federal judgeship attracts better lawyers than a state judgeship, by its larger salary—greatly enhanced by the privilege of retiring with full pay at the age of 70 and after 10 years service. It will not do to say that the privilege of retiring is a necessary incident of a life tenure, because the one need not be coupled with the other. In fact, during the first 80 years of our history they were not coupled; for though the judges have held their offices for life since our courts were first organized in 1789, no provision for their retirement was made until 1869.

I will even venture beyond this comparison between state and federal trial courts, and say that, considering the greater number from which its members may be drawn, the greater distinction of the place, and the larger salary attached to it, the Supreme Court of the United States, appointed by the President for life, has not greatly excelled the best Supreme Courts of our various states, elected by the people for a term of years. That statement must, of course, be understood as I have qualified it; and when so understood, it will not be seriously disputed.

In making his appointments to the Supreme Court of the United States, the President has before him the entire American Bar from which to choose, while in electing their supreme judges the people of every state are restricted to their own Bar. From this larger number the President can, of course, appoint greater judges to the Supreme Court of the United States than the people of any state can possibly elect to their highest court. Nor is the greater number of lawyers available the only advantage which the President in making his appointments enjoys over the people in holding their elections; for a place on the Supreme Bench of the United States is the highest judicial

honor to which an American lawyer can aspire, and therefore the very greatest of them accept, though they seldom seek, that position. Besides those two advantages, but less than either of them, the salary, though not a princely one, and not as much as any lawyer qualified for that court could easily earn, is yet much more than the states are either able or willing to pay.

With the nation to choose from, with the highest of all judicial honors appealing to the ambition of our profession, and with a salary sufficient to gratify every rational desire, it is not strange that the Supreme Court of the United States should be composed of the nation's very elect. But great as that court is, the supreme courts of our various states, when all things are duly considered, do not suffer by a comparison with it. Indeed, that great court itself constantly testifies its profound respect for the supreme courts of these states by quoting their opinions to fortify its own opinion.

The federal judiciary itself furnishes an abundant proof that the quality of its judges depends more upon the number from which they can be selected, the distinction of their office, and the salary than upon the method of their selection or their tenure. The circuit judges are superior to the district judges, and the judges of the Supreme Court are superior to both the district and the circuit judges. That difference cannot be due either to the way in which they are selected or to the tenure of their office, because they are all selected in the same way and hold their offices for life.

Exactly the same condition prevails in all the states, for the character and the ability of their judges grade according to the dignity of their courts. Their district judges are superior to their county judges; their appellate judges are superior to their district judges; and the judges of their highest court are superior to all below them. That difference cannot be due either to the manner of their selection or to their official tenure; for they are all elected by the people for a term of years. I realize that we can never safely conclude that certain results are due to certain differences where other differences exist; and it will be difficult, or it may even be impossible, to satisfy any man that the superiority of our federal over our state judges is

due to the difference in number, distinction, and salary rather than to the difference in selection and tenure; but I believe that I can find a comparison which will eliminate from our minds all doubt on that question.

Let us compare our federal and our state legislative departments. Here again we find that, as a rule, the federal are superior to the state officers; but we do not find any difference in the manner of selecting them, or in their tenure of office, because both Congressmen and state legislators are elected for a term of years. We do, however, find the same difference in number, in distinction, and in salary here as we found in the respective judiciaries; and must we not ascribe the same superiority to those same differences? Certainly we cannot ascribe it to differences in the manner of their selection or in their tenure of office, because no such differences exist.

The two senators who represent a state in the Senate of the United States are chosen from that state at large, while each state senator is chosen from a small subdivision of it; and each member of the federal House of Representatives is chosen from a district which includes many of the districts from which representatives in the state legislature are chosen. A county in choosing its member of the legislature can only take the best man in it, but a Congressional district may choose the best man in any one of its several counties.

I do not undervalue our state legislatures, and I know enough about those assemblies to warrant me in saying that the common appraisal of them is much below what they deserve; but according to them the full credit to which they are entitled, the distinction of a membership in them is incomparably less than the distinction of a seat in either House of Congress; and that difference, even if there were no other, will always bring better men into the national than into state legislative service.

The disparity between the salaries of state and federal legislators is much greater than the disparity between the salaries of state and federal judges. State senators and representatives are paid such a beggarly pittance that it does not meet the expenses of decent living while they attend the sessions of the legislature; while our federal Representatives and Senators receive

a sum which, notwithstanding the indifference with which some of them affect to regard it, is an ample compensation for their service—so ample, indeed, that a majority of them could not earn in their ordinary pursuits as much as they receive from the public treasury.

These differences fully account for the superiority of our federal Congress over our state legislatures; and I do not hesitate to say that the superiority would be quickly reversed, if the numbers, the distinction and the salaries were reversed. If the state could select its state senators and the representatives in its lower house from any portion of it; if the honor of a seat in the legislature were greater than the honor of a seat in Congress; if the salaries now paid to Congressmen were paid to state legislators; and if the salaries now paid to state legislators were paid to Congressmen, the character of our state legislatures would immediately advance, and the character of our Congress would immediately deteriorate.

If it be true—and undoubtedly it is true—that our federal legislators are superior to our state legislators on account of the wider field from which they may be selected, the greater distinction, and the higher salary, may we not also conclude that the superiority of our federal judiciary is due to the same reasons, and not to the circumstance that they are appointed, and hold their offices for life?

The assertion that judges who are elected by the people will strive to please the people is not such a grave objection to an elective judiciary as many men suppose; because after all, the most certain way in which a judge can please the people is to do his duty impartially and fearlessly. That judges elected by the people have sometimes responded to the emotions of the people is true; but it is also true that judges appointed by an executive have sometimes yielded to pressure from that executive. I rejoice to say that such misconduct does not often occur in either case; but I am compelled to say that it has occurred in the one case as often as in the other. A judge who would do wrong to please the many who had elected him, would do wrong to please the one who had appointed him; and a judge with manhood enough to defy the executive to whose favor he owed

his office, would never corrupt his conscience to conciliate the people.

The occasions on which judges who have been elected by the people have bowed before a storm of popular excitement, have been too rare to justify us in deducing a general rule from them; and viewing their conduct as a whole, it must be apparent to any unbiased mind that the people of these various states have elected their judges with a patriotic discrimination which has done much to justify our confidence in their capacity for self-government. That the people have made mistakes in electing their judges is true, but it is likewise true that executives have made mistakes in appointing judges; and comparing the number of elections with the number of appointments, the mistakes of the one have not been more frequent than the mistakes of the other.

Acknowledging that our state judiciaries have been singularly free from the vices which are supposed to be inseparable from popular elections, many good men express their great surprise that what they consider a bad system has not evolved bad judges; but to me the reason is obvious. Good judges have been elected in most of the states, because their elections have been largely controlled by lawyers. You may say that this explanation admits that good judges would not have been elected if the people themselves had controlled their election; but even that suggestion does not successfully impeach the wisdom of the people, because in recognizing that lawyers can be trusted to select their judges, the people have exhibited a high degree of common sense. The average layman understands as well as you and I do that lawyers are generally familiar with the ability and attainments of each other, and therefore know which one of their number is best fitted for the Bench. It will always happen that some lawyers will be more or less influenced by their personal friendships or by their political obligations, but those friendships and those obligations are seldom extensive enough to be controlling, and the merits of the several candidates almost invariably determine the result.

Not only do the lawyers, through their personal and professional acquaintance with the candidates, know better than other people who will make the best judge, but they have a greater

interest in the election of good judges than other people, and are, therefore, more certain to exert themselves in behalf of the best men. Their interest may be a selfish one, but this is one of the few instances in which there is no conflict between the selfish interest of a class and the general interest of a community, because every lawyer's success, no less than every citizen's safety, depends upon having competent and upright judges.

Every lawyer of ability desires a competent judge, because he knows that such a judge will avoid frequent and serious errors, thus economizing both the labor and the expense of litigation; and even the dullest lawyer desires a competent judge, because he knows that an incompetent one is just as apt to guess against him when he is right as to guess for him when he is wrong.

Every honest lawyer desires an upright judge, because he knows that he cannot hope for an honest decision of his cases except from such a judge; and the worst rascal who ever held a license to practise law prefers an honest judge, because he knows that a dishonest one, in order to avert suspicion from himself, will show scant courtesy to lawyers who are not in good repute.

Thus for selfish reasons, even if they were not influenced by nobler motives, lawyers unite in an effort to elect good judges; and the people, appreciating that fact, have permitted the lawyers to act as their agents in selecting the judiciary, reserving always to themselves the right to correct any mistake which the lawyers might happen to make. That plan has worked admirably in the past; but I am not so confident that the one by which it has been superseded in many places will work so well in the future.

Within the past few years, many of our states have adopted the plan of nominating all party candidates, judicial as well as political, at a primary election; and I have myself been an earnest advocate of that plan as applied to political offices in precinct, county, district and state, but I have never believed that our judges should be selected in that way.

It may be freely admitted that a primary election will always nominate a candidate for judge who is personally honest; but that is not enough. To be a good judge, a man must, of course, be honest in dollars and cents; but he must be more than that.

He must be honest with himself as well as with the litigants in his court; he must be honest in the sense that he dares always to do what he thinks is right, without pausing to calculate the consequences to himself; he must be honest in the sense that he will unhesitatingly surrender the highest office within the people's gift and retire to the obscurity of private life rather than to sin against his conscience.

It may be also freely admitted that a primary election will always nominate a candidate for judge who possesses good ability; but that is not enough. To be a good judge, a man must not only be able, but he must also be learned in the law; and an ignorant judge would be as certain to make his office a jest as a dishonest judge would be to make it a by-word. A man may know what the law ought to be without any technical knowledge of it, and such a man can be safely chosen to make the law; but no man can ever properly construe the law until he has made a diligent study of it, for only in that way will he be able to comprehend the relation of its rules to each other, or become imbued with the reason of it.

But even if the primary could always select a man of the highest integrity, of natural ability, and of the greatest learning, an ideal judge must possess still another quality. To serve acceptably in that high office, a man must not only be honest, able and learned, but he must also be courageous. The most pitiful weakling in all this world is the judge who lacks the courage to do what both his brain and heart inform him that he ought to do. The man who is worthy to be a judge must be one who will never flee from any duty; one who will always be ready to meet any crisis; one who will fearlessly face the military or the mob, commanding the one to salute the civil authority, and compelling the other to disperse. Only judges who combine courage, ability, learning and integrity, can preserve for the American judiciary the undiminished confidence of the American people.

Can we hope to secure such judges through the primary election? I doubt it. Not because I doubt the intelligence or the patriotism of the people, but because I am persuaded that the man who possesses those high qualifications will shrink from

a contest in which he may be defeated by some less capable, but more popular opponent. Popularity is not to be despised; but it is not a proof of judicial fitness. I do not subscribe to the statement that "a popular judge is an odious person," and I am more than willing that every judge shall crave that popularity which comes as the reward of ability, fidelity and courage; but seeking a popularity which is reducible to votes in a political primary will be most distasteful to the very lawyers who are best qualified for our judicial service.

I am not averse to an active political campaign, and I cordially approve the custom under which candidates for political offices declare their principles in public speeches; for the people are entitled to know the opinions of the men whom they choose to make the laws under which they must live. But the judge does not make the law, and it is not, therefore, material what he thinks about current political issues. The judge is chosen to serve the people, but not to represent them; he does not translate their convictions into statutes, nor shape the policy of a state. His office is simply to hold the scales of justice even as between man and man, and he should never be forced into a contest which must inevitably engender passions and prejudices which are fatal to judicial poise

To see two aspirants for an important judgeship engaged in a joint debate, bantering each other with anecdote and ribald jest, is not only a spectacle which must make the judicious grieve, but is also a spectacle which will be certain to deter many of our best lawyers from offering themselves as candidates. No lawyer who is capable of making such a judge as the people are entitled to have, can accept the office without a financial sacrifice; but the greatest of them are willing to make that sacrifice. Many of those ripest in wisdom, however, are not willing to engage in a campaign where the arts of the demagogue and the use of money are such potential factors; and we must make up our minds that unless we withdraw our judicial nominations from these strenuous political primaries, our judges, in time, will be our most skillful politicians rather than our most learned lawyers.

We can expect those who seek our political offices to submit to the disagreeable incidents of a primary election; but we can-

not expect that the man who is making a sacrifice to accept a judgeship will do so. All men recognize a difference between a political and a judicial office, and we should recognize a corresponding difference between a candidacy for those offices. No good citizen thinks it improper to urge executive or legislative officers to decide any question before them as he believes it ought to be decided; but no good citizen ever attempts to obtrude his advice upon judges with respect to the cases before them. Just as we may ask the one to decide for us, but not the other, so the one may personally solicit our votes, but not the other. So long as the people themselves exact from a judge a greater circumspection, in his personal as well as in his official conduct, than they do from a political officer, they should require every candidate for a judgeship to observe a greater decorum in his canvass for the office. If a better behavior is expected of a man when he is in a judicial office, then a better behavior should be expected of him when he is a candidate for that office.

THE METHOD OF ADMINISTERING JUSTICE.

The method by which the American judiciary administers justice happily does not differ in the federal and state courts so widely as the manner of selecting judges and their tenure of office. There are, of course, rules of procedure as various, and almost as numerous, as the different states; but the central principle—the great balance-wheel, as it were, of the judicial machinery—is the same in all of our courts. And if I were called upon to specify the distinguishing excellence of our system, I would answer without hestitation that it is the arrangement which refers all questions of law to the court, and all questions of fact to the jury. I am not, of course, unmindful that some of those who philosophize on government contend that the trial by jury is an effort to democratize the administration of justice, and is, therefore, a hurtful admixture of political theory with judicial function. Even some eminent lawyers maintain that the jury introduces a political element, and therefore an element of uncertainty, into the trial of every case. There was a time in my life when I was almost persuaded to accept that view, because it seemed to me that a trained mind was better qualified to weigh the facts, as well as to construe the law; but years of constant

and personal attention to the proceedings of our courts have thoroughly convinced me that the concurring judgment of twelve good men is a safer reliance in the determination of facts than the single judgment of any man, no matter how great his ability or how high his character may be.

In my experience at the Bar, I have seen many juries render verdicts for more than I thought was proper, and I have also seen them render verdicts for less than I thought was proper; but I have seldom seen a jury find for the plaintiff when I thought it ought to have found for the defendant, or find for the defendant when I thought it ought to have found for the plaintiff. That juries often adjust questions of amount by a compromise, and that they sometimes reach their verdict by processes which the law discountenances, are admitted defects of the system; but with all its defects, a trial by jury is the best method ever devised by the wisdom of men for a determination of the facts in any case.

It is sometimes said that if the trial of all cases, upon the facts as well as upon the law, were committed to a single judge, we would escape the delays of justice which occur from time to time through the failure of juries to agree upon a verdict; but those who will take the trouble to examine the dockets of our courts will find that such delays are so infrequent that they do not justify a serious criticism, and that they are incomparably less than the delays of justice chargeable against our courts.

Our trial judges have fallen into the habit—a habit which, I regret to say, is growing despite its manifest evils—of taking so many cases under advisement that they find themselves with more to do in their chambers than in their court-rooms. Any good trial judge ought to be able to decide a case at the conclusion of the argument, assuming that the lawyers have argued it properly. Certainly he ought to be better able to decide it then, when the impressions made on his mind by the evidence and the arguments are distinct, than when he reaches it six weeks or six months later after having disposed of the others previously taken under advisement, and when those impressions have been almost completely effaced. It is a poor compliment to our judiciary—or else it is a poorer compliment to our Bar—to say

that after the lawyers have argued a case for their respective sides, the judge is still unable to decide it.

But much as I value the trial by jury, I do not consider it the only part of our system indispensable to its successful operation. I believe the power of the court to declare the law is as essential to a wise administration of justice as the power of the jury to ascertain the facts; and I would no more withdraw from the court the right to expound the law than I would deprive the jury of the right to determine the facts. The common sense and the experience of the average man qualify him well to weigh the testimony and judge the credibility of witnesses. But the most intelligent layman cannot be expected to know the law, which is often so difficult, and sometimes so doubtful, that even the most learned judges are mistaken about it; and when I see a lawyer attempting to persuade a jury to ignore the instructions of a court, I feel that he is assailing the very foundations of our judicial structure, and violating the spirit, if not the letter, of the oath upon which he was admitted to the Bar. Not only is it the duty of a juror to receive the law as the court declares it, but it is likewise the duty of every lawyer in his argument before the jury to do so, reserving the correction for the court above, if the court below has misconstrued the law.

When I say that the court should declare the law, I mean that it should declare "the law of the land" as it has been written by the legislature of its jurisdiction, or decided by the highest court; and not that it should declare some vague, indefinite notion of justice cultivated by that particular judge. A few years ago, a statement like that would have seemed almost an insult to the intelligence of an audience like this; but we did not then have with us these modern reformers who insist that our judges shall decide every case according to justice, rather than according to the law, thus implying that justice is not wrought out through the law. That the law cannot do justice in every case is understood by every lawyer; but lawyers also know, what these reformers do not appear to understand, that the cases in which justice fails through a strict application of the law are only the few and exceptional ones which cannot be brought within the wisest general rule. It is sometimes suggested that the court should be empowered to suspend the law in such cases, and decide

them according to justice; but the absurdity of that suggestion lies in the fact that it is not possible to classify those cases. If that could be done, then a general rule could be formulated for them, and we would have a perfect system of administering justice—a consummation always devoutly to be wished, but never to be realized as long as the law is the product of imperfect human logic.

But even if the exceptional cases were more numerous than they are, and if justice miscarried oftener than it does, it would still be better that judges shall be required to follow those general rules which have been matured through the patient and conscientious study of great men, through many generations, than that every man should hold his life, his liberty, and his property subject to a judgment varying as one or another man might happen to preside in each particular trial. A great jurist once said that "the certainty of the law is as important as the justice of it," and while that cannot be accepted in its literal meaning, it stresses a truth vital to the repose of organized society. If there were no established rules of law, no man could know from day to day what he owes to others or what others owe to him; and no lawyer could, with any confidence, advise a client about his rights or his obligations. The best of us could say no more in the plainest case than that it would be decided according to the individual views of the judge who might happen to try it, and the right of appeal would, in a majority of cases, be a barren one. That would involve us at first in legal chaos, and at last in political anarchy.

Not all laws are just, but their correction must rest with the legislative and not with the judicial department. It is for the legislature to make the law; it is for the court to construe the law; and strangely enough, these crusaders who demand that courts shall administer justice without regard to the law are the same men who are always inveighing against what they call judge-made law, apparently unconscious that their demand and their criticism are utterly irreconcilable.

Judicial Control.

The only special feature of the American judiciary which I shall occupy your time in considering is its power to declare

that a legislative act repugnant to the Constitution is void. That power of course, exists in state courts as well as in federal courts, and inferior courts possess it as well as courts of last resort; but in view of the fact that our state constitutions differ in one essential particular from our federal Constitution, it will be necessary in order to avoid a confusion of thought or speech, to confine myself to the one or the other. State constitutions, I need not say to you, are limitations on the power of the legislative assemblies which they create, while the Constitution of the United States is a grant of power to the Congress which it created; and I shall discuss this question as it relates to the federal Constitution, leaving you of course to understand, as well as I do, that all I say in that connection can, if suitably altered, be said in the other connection.

Ours was the first government in the history of the world so organized as to give its judicial department the power to decide that a legislative enactment is void; and there were those, respectable in character and ability though inconsequential in numbers, who did not in the beginning believe that such a power ought to be conferred on the American judiciary. But when the Constitution was framed, and when it was ratified, it was generally, if not universally, conceded that such a power had been bestowed upon our courts. The controversy over it, however, assumed an almost partisan-political aspect when it was decided, in Marbury *vs.* Madison, that so far as an Act of Congress conflicts with the Constitution of the United States it is void, and the court must so declare it.

That doctrine provoked a violent protest, and was denounced as a judicial usurpation. Some of the wisest statesmen, and some of the most illustrious patriots, of that day joined in assailing both the decision and the court which rendered it; but even the authority of their great names could not prevail against the unanswerable logic of Marshall's opinion, and for a hundred years it was accepted by the Bench, the Bar, and the American people as having settled the question. I do not mean that there were not occasional, and even vigorous, denunciations of it by those in high places during that time; but the acquiescence was so general that even its opponents of the greatest influence never

attempted to procure a reversal of it in the courts or a condemnation of it by the people.

Within the last few years, however, there has been a persistent and concerted effort to revive that issue. The chief justice of a great state, aided by some law professors, and by not an inconsiderable number of lawyers, are industriously conducting a propaganda against the doctrine; and at least one speech challenging it has been printed as a public document by the Senate of the United States. The activity of those gentlemen could be safely ignored if they were content to ask a rehearing by the Bench and the Bar of this country, as we might well expect them to do, since it is purely a legal question; but they are making their appeal to the American electorate, whose prejudices they endeavor to flatter with the specious argument that they are striving to prevent a few men—sometimes ungraciously described as "elderly lawyers"—from usurping a power over all the people; and we must follow them into the forum which they have chosen, to discuss the question upon reason rather than upon authority. We must do that because those gentlemen have poisoned the public mind—or at least they have attempted to poison the public mind—with the repeated assertion that the courts will, of course, sustain their own claim of power, and their decisions on this particular question cannot, therefore, be received with any special deference.

It has been alleged that the Constitutional Convention decisively, and on four different occasions, rejected a provision authorizing the courts to declare any legislative act void, if repugnant to the Constitution. Had that statement come from some ordinary and shallow agitator, I would not have thought it worth a contradiction, but when I tell you it was made in a carefully prepared address by the chief justice of a great state, I am sure you will share my amazement. Not only is he mistaken when he says that the friends of judicial control sought a specific grant of that power; but what makes his mistake more inexcusable still is that they were the very men who most strenuously opposed the proposition which he seems to have misread. That proposition was to join the judges with the executive in the veto, and the two arguments made against it were: First,

that the court ought not to be required to pass on legislation as a matter of policy, because that is not a judicial function; and second, that as the court might be compelled to pass on the constitutionality of any given statute after it had been enacted, the judges ought not to be required to express an opinion on it in advance of its enactment. Thus, with the facts before us, we see that one of the main arguments against the power of courts to declare unconstitutional legislation void is really an argument strongly sustaining that power.

No man who is familiar with the history of the Philadelphia convention, can doubt that those who framed our Constitution did so with a full understanding that it prohibits the enactment of unconstitutional laws, and requires our courts to hold all such laws to be without effect. It would unduly tax your patience for me to review all which was spoken in that convention on this question, and I am sure you will accept my word for it when I say that, so far as we have any authentic record of its debates, only two members of that body unequivocally expressed themselves as opposed to that power. A third member expressed the opinion that "no such power ought to exist," but confessed himself at a loss to find a substitute for it, and subsequently, in a paper advising a ratification of the Constitution, conceded that the power had been conferred. To these must be added Mr. Madison, who, though opposed to "the subordination of the legislature," thought the court might properly be authorized to finally and conclusively determine what he called "judiciary questions;" and I think an examination of all he said on that subject will make it plain that he only objected to giving the court the power to decide what we now call "political questions" —a power which the court itself has never assumed, and has repeatedly disclaimed. Other than those four delegates, every member of that convention who adverted to the question, and many of them did so, declared unequivocally that the courts should have the power to declare every act repugnant to the Constitution null and void.

Turning now to the Constitution itself, we find on the very face of it an overwhelming refutation of the charge that it is inconsistent with a republican form of government for a court

to declare a legislative enactment void; because the Constitution explicitly commands all state judges to hold certain legislative enactments void, and exacts from them a solemn promise under oath to do so. The second sentence of Article VI of the Constitution of the United States declares:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

The history of that provision will illuminate it better than any analysis which I could make of it, and with your permission I will briefly recite it.

One of the serious defects in the government under the Articles of the Confederation was that the states sometimes refused to execute the laws of the General Congress, and several of them had so far disregarded our treaty of peace with Great Britain as to bring us almost to the verge of a rupture with that country. Congress, unable itself to nullify the state laws in contravention of that treaty, implored the states to repeal them, even going so far as to prepare the form of a repealing statute, which was transmitted by an official communication to the several states.

That circumstance explains the peculiar phraseology with respect to the supremacy of treaties—a phraseology which has led some men erroneously to suppose that the Constitution does not limit the treaty-making power as it does the law-making power. The different language was intended merely to meet a different condition, and not to establish a different principle. The laws of the new government would, of course, be made under the Constitution which was then proposed, and could, therefore, be "made in pursuance thereof." Not so, however, with the treaties, because it was the intention that the new government should assume the obligations of, and execute, the treaty of peace with Great Britain, as well as all other existing treaties with foreign nations; and, as they had been made before the Constitution was adopted, they had not, of course, been "made

in pursuance" of it, though they had been made under the authority of the United States, for that was the official designation of the government preceding the present one.

Instructed by their experience, it is not surprising that all concurred in thinking that the authority of the new government should be made paramount within the limits assigned to it by the Constitution. Randolph's plan of government provided that the national legislature should have the power:

"To negative all state laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union or any treaty subsisting under the authority of the Union."

The plan of Pinkney provided that:

"The Legislature of the United States shall have the power to revise the laws of the several states that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress and to negative and annul such as do."

The plan of Patterson contemplated only a revision of the Articles of Confederation, and yet it provided:

"That all the acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States . . . . and that the judiciary of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding."

Hamilton's plan declared that:

"All of the laws of the States contrary to the Constitution or laws of the United States shall be utterly void."

And as a further assurance of federal supremacy it provided that the general government should appoint the Governors of the several states, who should have a veto on all state laws.

It was then proposed more than once that the general government should be given the power to negative all state laws without regard to whether they were contrary to the Constitution or the laws or the treaties of the United States, and some of the ablest men in that convention cordially supported that proposi-

tion; but as the debate proceeded it became apparent to the delegates that such a power, if conferred on the general government, would ultimately destroy every vestige of states' rights, and it was rejected. But the convention was so thoroughly impressed with the necessity of protecting the authority of the new government against contravening state enactments that they applied themselves to the task of finding a way to do it; and with a practical unanimity they agreed upon the clause which I have read to you.

Confronted with this definite and positive requirement that all state judges shall hold state laws and even state constitutions void in certain cases, no man should discredit his intelligence and candor by saying that a republican form of government will not permit a court to pronounce the acts of a legislature void.

In this provision requiring state judges to hold state constitutions and state laws void, if they conflict with the federal Constitution or federal laws or federal treaties, there is an implication which seems to have escaped many of these gentlemen who assert that there is not a line in the Constitution which requires, or even authorizes, any court to annul a legislative enactment. The supremacy of the Constitution of the United States is made absolute; but the laws of the United States are made supreme only with a most important qualification. State judges are not required to enforce all federal laws against state constitutions and state laws, but only such federal laws as are "made in pursuance" of the Constitution. Therefore, the Constitution plainly requires a state judge to pass upon the constitutionality of every federal law which is alleged to be in conflict with a state law. That must be true, because otherwise state judges would be compelled to disregard a state constitution or a state law against which a federal right was asserted without considering that very important qualification which gives a federal law supremacy only when "made in pursuance" of the Constitution. It would be obviously impossible for a judge to decide any case where a right was claimed under a state statute and a defense made under a conflicting federal statute, or *vice versa,* without determining whether the federal

statute was "made in pursuance" of the federal Constitution; because unless it was so made, it is not "the supreme law of the land," and it could not invalidate the state statute. In such a case, if the federal law was "made in pursuance" of the federal Constitution, then the court would be compelled to declare the state law void; and if the federal law had not been "made in pursuance" of the federal Constitution, the court would be compelled to declare it void in order to sustain the state law. But in either event, the court would be compelled to declare one or the other law void.

I have not, of course, overlooked the fact that the special provision which I have been emphasizing is addressed to the judges of the several states, and not to the judges of the United States; but that provision is followed immediately by another, which compels all federal judges to swear that they will support the Constitution of the United States. How can any judge keep his oath to support the Constitution unless he gives effect to its declaration that it is the supreme law of the land; and how can he give effect to that declaration unless he disregards all laws which contravene the Constitution?

Let us put the question to a practical test, and suppose that Congress had enacted a law granting to John Doe the homestead of Richard Roe, and that, Richard Roe having refused to surrender his property, John Doe instituted a suit to recover it. When that case finally reaches the Supreme Court of the United States—and it must be remembered that the Supreme Court never passes upon the validity of any law except when required to do so in a case properly brought before it—the record will disclose that John Doe had declared on the Act of Congress, and that Richard Roe had plead that provision of the Constitution which guarantees that no person shall be deprived of his property without due process of law. The case is before the court and must be decided. The Act of Congress plainly gives Richard Roe's property to John Doe; but that act is plainly forbidden by the Constitution, because without the shadow of a doubt a legislative transfer of one man's property to another is not due process of law. Both the Act of Congress and the Constitution apply to the case; but both cannot be applied to it. What shall

the court do? Suppose that question was submitted to an intelligent layman. How do you think he would decide it? He might know nothing about the division of power between the general government and the states; he might know nothing about the distribution of federal powers among the several departments; he might know nothing about the theories of legislative omnipotence or judicial control; but he would know that having taken an oath to support the Constitution as the supreme law of the land, he could not, without violating that oath, enforce any Act of Congress which violates the Constitution. That is the moral view which an intelligent layman would take of the question; and it is the legal view which all judges must take of it.

Turning now from the Constitution, let us consider the political aspect of this question, and I think I can demonstrate that, according to the maxim that "the will of the people shall prevail," the doctrine of judicial control is unassailable. When a law of Congress conflicts with the Constitution of the United States we have the will of the people expressed in two different forms; for certainly nobody will deny that the Constitution expresses the will of the people, and I will not deny that the statute also expresses the will of the people. If that stated the whole case, I would abandon the argument, because the statute, being the last expression of the popular will, might well be received as the controlling one. But that does not state the whole case, because the Constitution is the more deliberate will of the people, and deliberation is vastly more important than precedence in time.

The Constitution of the United States was framed, as all men know, by the most intellectual body of patriots who ever assembled to perform any given work; and they spent months proposing, debating, and amending almost every sentence in that great charter. It was drawn with a care unprecedented; and when completed it was submitted to the people for their approval through representatives especially selected for that purpose. It was subjected again to the most exhaustive consideration in the conventions of the various states which ratified it, with the result that, in compliance with the demand of these states and out of an abundant caution, ten amendments, in the

nature of a bill of rights, were added to it. Other amendments have been added to it, but not one of them alters a single original principle embodied in it. The Eleventh Amendment was intended to correct what was believed to be a judicial misconstruction, and the other amendments, except the three which grew out of the war, relate to methods rather than to principles. The Constitution thus represents the will of the people twice and deliberately expressed.

With these uncontroverted and incontrovertible facts before us, we must realize that when called upon to decide between the Constitution and a statute in conflict with it, the question, in this aspect at least, is, Shall the will of the people as expressed after grave deliberation in their Constitution, or the will of the people as expressed in a statute, be executed? I will not say, as others might feel at liberty to say, that Congress is as apt to misrepresent as it is to represent the will of the people; nor will I stigmatize that body by saying, as can too often be justly said about it, that it legislates with much haste and with little care. But, allowing to an act of Congress all of the weight to which it is entitled as an expression of the people's will, the Constitution is entitled to still greater weight; and, where the statute and the Constitution both cannot be sustained, I would, if there were no other reason, unhesitatingly decide in favor of if there were no other reason, unhesitatingly decide in favor of the Constitution, as the most deliberate expression of the people's will.

There is another and a very decisive reason why the Constitution, still considered in a political sense, should prevail over a statute. The Constitution is not only the deliberate will of the people, but it is the compact by which every man has agreed to be governed. It is the covenant which the majority made with the minority, and with all the people, that certain fundamental and inalienable rights shall not be subject to legislative control. That Constitution provides for its own amendment, and its safeguards may be thus destroyed; but even against that action it interposes a valuable security by providing that it can only be amended by resolutions supported by two-thirds of each House, or on the application of the legislatures of two-thirds of the several states, when ratified by three-fourths of all the states.

Under that substantial guarantee, every man in the United States, from the greatest to the humblest, holds his life, his liberty, and his property above legislative spoliation, and a Congress created by the Constitution has no moral or legal right to abrogate the limitations on its own power.

There is still another, and a very cogent, argument supporting the view that no statute opposed to the Constitution can be sustained; and that argument arises out of the very purpose of a written constitution, which was, and is, to restrict the power of our agents and representatives. We adopted a written constitution because we are not willing for the living to govern us except within certain limitations, and not because we believe that the dead have any right to govern the living. But to what purpose shall we write our constitutions, if, after we have written them, those whose power they are intended to limit may ignore their limitations? Our fathers were not so stupid as to think that they could secure their own freedom and the freedom of their posterity by limiting the power of our representatives, and then leaving these representatives the sole and final judges of the limitations on their power.

I do not underestimate the force of the argument against vesting in one department of the government an authority to annul what another department has done; but I consent to that as the lesser of two evils. We must leave Congress the exclusive judge of its own powers, or else confide the right of final judgment on its acts to our courts; and whatever may be the objections to judicial control, they are infinitely less than the objections to legislative omnipotence. Since we must have a final judge, that power can be more safely trusted to the court than to the Congress, for it cannot be an invidious comparison to say that, in average ability, the Supreme Court of the United States is, at least, equal to the Congress of the United States; and as the judges of that court have devoted their lives to a diligent and uninterrupted study of the Constitution and laws of their country, they must know better how to judge between them. They are far removed from those political passions and prejudices which make the preservation of a free government the most stupendous task of all the ages; they have no patronage with which

to reward their followers, and no partisans to sustain them, right or wrong; they have no interest except in common with their countrymen, and no ambition except to leave behind them an honored name. Of all men in this world they have the least temptation to do wrong and the greatest incentive to do right. They are not infallible, and they make their mistakes, but they make fewer mistakes than other men; and so long as they can guard the Constitution of this republic, it will protect the lives, the liberty, and the property of the American people.